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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Petition of Bell Atlantic for Relief from Barriers
to Deployment of Advanced
Telecommunications Services

Emergency Petition of Bell Atlantic — West
Virginia for Interim Relief

CC Docket No. 98-11

COMMENTS OF THE HELICON GROUP, L.P.

1. Introduction and Summary.

Pursuant to the Public Notice in this matter, The Helicon Group, L.P. ("Helicon") respectfully files these comments in response to the "Emergency Petition of Bell Atlantic — West Virginia For Interim Relief."¹ In that Petition Bell Atlantic seeks authority to construct interLATA facilities and provide interLATA services between the Clarksburg LATA and Pittsburgh, either through the vehicle of a waiver of Section 271 (based on Section 706 of the Telecommunications Act of 1996) or through the vehicle of a LATA boundary modification to accommodate these services. The Commission should deny Bell Atlantic's Petition for three reasons.²

¹ Public Notice, DA 98-1506, NSD-L-98-99, "Request by Bell Atlantic—West Virginia for Interim Relief under Section 706, or, in the Alternative, a LATA Boundary Modification" (released July 28, 1998). The petition itself is referred to herein as "Bell Atlantic Petition."

² On August 7, 1998, the Commission issued an order in this and related proceedings holding, *inter alia*, that Section 706 of the Telecommunications Act of 1996 (the "1996 Act") does not provide legal authority to the Commission to forbear from applying the requirements of Section 251 or Section 271 of the Communications Act of 1934, as amended (the "Act"). Helicon is nonetheless filing these comments because the Commission also held out the possibility that it could engage in targeted modifications of LATA boundaries in order to implement the policies of Section 706.

First, the Petition is moot. Its basic premise is that there is a severe “bandwidth famine” into and out of West Virginia — particularly from the Clarksburg LATA in the northern part of the state to Pittsburgh (a major point on the Internet backbone) — and that extraordinary relief is necessary to allow West Virginia schoolchildren to upgrade their Internet access. In fact, as of the date of this filing, there is an OC-12 fiber connection up and running between the Clarksburg LATA and Pittsburgh. That connection is upgradable to OC-48 simply by upgrading the electronics to accommodate the higher speed transmissions.³ The fact that this link is up and running eliminates any “emergency” that may once have existed. This Helicon link is commercially available for use by any inter-exchange carrier.

Second, Bell Atlantic has been free since February 1996 to construct interLATA facilities to provide Internet access to West Virginia’s K-12 schools. Section 271(b)(3) of the Act specifically exempts “incidental interLATA services” from the general interLATA ban. Section 271(g)(2), in turn, specifically includes Internet access using dedicated facilities for elementary and secondary schools as an “incidental interLATA service.” Bell Atlantic presumably has its own reasons to explain its failure to establish such facilities. However, any suggestion that the Internet access needs of West Virginia’s schoolchildren are somehow being denied by the general operation of Section 271 (or by the strict enforcement of existing LATA boundaries) is completely misguided. In this respect, Bell Atlantic’s petition for emergency relief should be denied because the statute on its face already permits Bell Atlantic to do what it wants.

Third, to the extent that the interLATA Internet access connection would be used by more than simply K-12 students, Bell Atlantic has been free since February 1996 to comply with the mandate of Section 251 of the Act — and the Section 271 checklist — by *actually opening its local markets to competition*. Yet two and one-half years after the passage of the Act, Bell Atlantic has not applied for interLATA authority under Section 271 for any of its states,

³ This is the connection that Bell Atlantic refers to as having been “cobbled together” by “a cable company.” Bell Atlantic Petition at 4. Helicon is filing these comments because it is that cable company.

and there is no indication that West Virginia is high on its list of priorities. Respect for the basic legal framework established by the Act suggests that the Bell company requesting any form of interLATA relief should be required to show that it has at least *tried* to obtain interLATA authority using the normal, prescribed statutory procedure for doing so.

2. Helicon's Ability To Assemble An OC-12 Fiber Link Demonstrates That Market Forces Work In West Virginia.

Like many cable companies around the country, Helicon is exploring opportunities to enter telecommunications and information services markets as logical complements to its pre-existing cable television business. To this end, for example, Helicon affiliates are seeking certification as competing local exchange carriers ("CLECs") in various states. Helicon also provides Internet access services using various technologies in certain areas. More recently, Helicon has been exploring ways to enter the market for interstate services.

In January 1998, Helicon became aware through its sales organization that the state of West Virginia had let a contract for high-bandwidth connections from its state network to the Internet backbone, and that there was apparently some difficulty in obtaining that bandwidth from established carriers.⁴ Helicon saw this as an opportunity to enter the interstate, interLATA services market.

This opportunity existed because Helicon operates cable systems in the region, from the area outside of Pittsburgh to and including the Morgantown area in West Virginia. Like telephone companies, Helicon and other cable companies have found it to be economical and prudent to include spare fibers when deploying optical fiber in their cable systems, because the cost of installing the spare fiber is modest compared to the cost of upgrading the cable system without spare fiber, then incurring construction costs a second time to augment the fiber later.

⁴ See Bell Atlantic Petition at 3. Helicon has no independent knowledge regarding whether any particular established interLATA carrier (including those noted in Bell's Petition) actually did or did not receive requests for service from Bell Atlantic or anyone else associated with the West Virginia situation, and has no independent knowledge of the capacity limitations such firms may actually face.

As a result of this practice, Helicon believed that its own optical fiber, along with optical fiber owned or controlled by other cable operators in the region, could be used to establish the necessary connectivity between the Clarksburg LATA and Pittsburgh.

After reviewing its plant records, Helicon determined that additional construction would be needed to provide a complete link from Clarksburg to Morgantown to Pittsburgh. Helicon promptly undertook that construction, eventually spending more than a quarter of a million dollars to place more than 16 new route miles of optical fiber, in addition to the spare fiber that already existed and could be used for this purpose.⁵

At the same time, Helicon began to pursue arrangements with cable operators along the Clarksburg-to-Morgantown-to-Pittsburgh route to obtain the right to use *their* fiber so that an end-to-end link could be created. To make a long story short, this effort was successful in the Pittsburgh area, but not in the Clarksburg area. The result is that Helicon was able to provide a fiber optic link from a location near Morgantown (in the northern part of the Clarksburg LATA) to Pittsburgh. Moreover, once it became clear that the Clarksburg-to-Morgantown leg of the facility would not be forthcoming in a timely fashion, Helicon agreed with Bell Atlantic that it would establish a point of presence ("POP") in Morgantown (as opposed to both Morgantown and Clarksburg) and that Bell Atlantic would provide a special access facility (wholly intraLATA) from Clarksburg to that Morgantown-area Helicon POP.⁶

⁵ This may not seem to be a great deal of money when compared to the multi-billion dollar investments in bandwidth being made by firms such as Qwest and Level 3, as discussed in the record of the various ongoing proceedings at the Commission (including this one) regarding interLATA relief for data services under Section 706. For a relatively small firm like Helicon, however, this is indeed a significant investment commitment.

⁶ Helicon of course regrets the delays that were encountered during the process of first attempting to obtain the required connectivity in the Clarksburg area then determining that such connectivity could not be established in a timely fashion. In the context of Bell Atlantic's Petition, however, this simply shows that while markets respond to consumer demand (in this case the demands of the state for increased bandwidth), at times the response is not totally smooth and seamless. It is hardly surprising, though, that in an era of exploding demand for bandwidth,
(continued...)

The net result of these efforts, as noted above, is that as of today there is an OC-12 fiber optic network, operated by Helicon, that links Clarksburg and Morgantown to Pittsburgh. In June, Helicon contracted to provide WorldCom six DS-3 circuits from Clarksburg to WorldCom's point-of-presence in Pittsburgh over the OC-12 network. In turn, WorldCom contracted with Bell Atlantic to use one of these DS-3s for the West Virginia connection. In provisioning this circuit, Bell Atlantic will provide connection from the customer location to the Helicon POP in Morgantown, and Helicon will provide the transportation to Pittsburgh. The last link from the Helicon termination in Pittsburgh to the WorldCom POP in Pittsburgh is being provisioned on August 10 and is expected to be completed within a few days. The OC-12 network can be upgraded to OC-48 as the demand for bandwidth into and out of Northern West Virginia grows. This link can be used not only for the state's needs for Internet connectivity but for any other interLATA communications as well.⁷

Perhaps it is simply a matter of perspective, but where Bell Atlantic sees a market failure in this situation, Helicon sees a confirmation that market forces work. As the FCC points out in its recent Notice of Inquiry concerning the deployment of advanced telecommunications facilities, the question is whether, in reality, a shortage exists, as opposed to "... the occasional transient lack of supply that is to be expected in any market undergoing unanticipated and explosive growth in demand."⁸ Taking Bell Atlantic fully at its word that the major long distance

⁶(...continued)

temporary supply shortages arise from time to time. It is only in conditions of *oversupply* that one would expect all requests for bandwidth to be able to be filled without delay.

⁷ Bell Atlantic derides Helicon's efforts as a mere "cobbling together" of fiber optic facilities, *see* Bell Atlantic Petition at 4. As Helicon understands it, however, such "cobbling" is quite common for all but the very largest IXC's. Most IXC's want to be able to provide ubiquitous service, but do not have nationwide facilities to do so. To address this problem, they obtain "leased lines" from other carriers who *do* have facilities in areas where service is needed. This is exactly what has occurred in the case of the Morgantown-to-Pittsburgh OC-12 that Helicon has now established.

⁸ In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, FCC 98-187, *Notice of Inquiry* at ¶33 (rel. Aug. 7, 1998).

carriers did not have adequate capacity, it would not be surprising to Helicon if, as a business matter, those firms might view their investment dollars better deployed in upgrading capacity in more urbanized areas. Demand growth is greatest in those areas (at least in absolute terms) and the potential return on investment probably highest as well.

To acknowledge the reality that West Virginia is a relatively small market, however (at least compared with some other areas), does not mean that West Virginia is not a market at all. To the contrary, it simply means that the market opportunities presented by West Virginia are more likely to be exploited by smaller firms, such as Helicon, that are looking for opportunities more in line with their relatively limited operational scope as compared to the likes of AT&T, MCI, or Sprint.

For these reasons, from Helicon's perspective, Bell Atlantic's Petition is both misguided and moot. It is misguided because it assumes that temporary glitches in the market's efforts to meet demand for bandwidth in West Virginia somehow indicate that there is a significant market failure that can only be remedied by eliminating the core interLATA restrictions contained in Section 271 of the Act. And it is moot because as of today, a large and expandable link from the Clarksburg LATA to Pittsburgh is up and running — precisely because market forces work.⁹

3. Bell Atlantic Already Has The Authority To Provide InterLATA Internet Connectivity For West Virginia's Schools.

Bell Atlantic's Petition is obviously intended to play on the Commission's sympathies regarding the needs of West Virginia schoolchildren to have adequate access to the Internet.¹⁰ And, at least in the abstract, those sympathies are well-placed. The Internet is an

⁹ In fact, Helicon is willing to work with any telecommunications carriers and cable companies to expand its network to other cities in West Virginia including Clarksburg, Charleston and/or Parkersburg.

¹⁰ See, e.g., Bell Atlantic Petition at 2-3, 5.

important and exciting new communications medium. Helicon fully supports the efforts by Congress (for example in Section 254 of the Act) and the Commission (for example in its Universal Service proceedings) to ensure that America's schools have top-notch Internet connectivity in order to take advantage of the research and educational opportunities that new medium provides.

However, Helicon is at a loss to understand why Bell Atlantic — if it is so concerned about Internet connectivity for the schoolchildren of West Virginia — has failed for two and one-half years to take advantage of its explicit statutory authority to meet those connectivity needs. Section 271(b)(3) of the Act states that Bell companies may begin providing “incidental” interLATA services immediately upon enactment of the 1996 Act. Section 271(g)(2), in turn, expressly includes Internet access for elementary and secondary schools as one form of “incidental” interLATA service. It follows that for the last two and one-half years, Bell Atlantic has had full legal authority to deploy the facilities needed to link up West Virginia's K-12 schools to the Internet, whether those facilities run to Pittsburgh, to MAE East in Northern Virginia, or, for that matter, to MAE West in California.

Helicon will speculate neither as to why Bell Atlantic has ignored this plain statutory authority to serve the Internet connectivity needs of West Virginia schoolchildren for the last two and one-half years, nor as to why this issue was not addressed in the 1997 version of Bell Atlantic's incentive regulation plan referred to by the West Virginia utility Consumer Advocate, Mr. Gregg.¹¹ In the present context it is sufficient to note two points.

First, given the clear and longstanding statutory authority that already exists for Bell Atlantic to provide a substantial fraction of the interLATA connectivity for which it seeks “emergency” relief, it would be senseless for the Commission to issue Bell Atlantic's requested ruling. The Commission has recently ruled that it does not have the legal authority under Section

¹¹ See Affidavit of Billy Jack Gregg (attached to Bell Atlantic Petition) at ¶¶ 3-4.

706 to waive Section 271's basic requirements.¹² To the extent that the Commission believes that it nevertheless retains the authority to modify existing LATA boundaries on an emergency basis, such authority should be exercised sparingly, and only in the most compelling circumstances. Where, as here, a petitioning Bell company has an independent and pre-existing statutory basis for providing the interLATA services for which it seeks emergency authority, it would do violence to the basic scheme of the 1996 Act to ignore the pre-existing authority and (in effect) overrule the basic requirements of Section 271 for no reason.

Second, Bell Atlantic's pre-existing interLATA authority to provide Internet access to West Virginia's K-12 schools — aside from providing an object lesson on the caution with which regulators must always view Bell company claims that they are trying to obtain special regulatory benefits not for themselves, but for "the children" — shows that, to the extent that any emergency situation existed regarding Internet access for West Virginia schools, that emergency was entirely of Bell Atlantic's own making. Simple administrative prudence suggests that the Commission should not entertain petitions for emergency relief when the petitioning party has not only failed to take reasonably available steps to solve the problem without special relief, but has, indeed, directly contributed to whatever "emergency" actually exists.

4. Bell Atlantic Can Escape The InterLATA Restriction At Any Time By Complying With Sections 251 And 271.

As noted above, it has been two and one-half years since the passage of the 1996 Act. As the Commission is well aware, that Act on its face contains a mechanism by which a Bell company can obtain the authority to offer in-region interLATA services: open up its markets to competition in accordance with Section 251 and Section 271. Notably absent from Bell

¹² In the Matter of Deployment of Wireless Services Offering Advanced Telecommunications Capability and Petition of Bell Atlantic, et al. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket Nos. 98-147, 98-11, 98-26, 98-26, 98-32, 98-15 RM9244, 98-78, 98-91, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* at ¶ 77 (rel. Aug. 7, 1998).

Atlantic's Petition is any effort to explain why it has not yet done so in West Virginia. This should be fatal to its request for emergency relief.

Clearly, before the Commission should take extraordinary regulatory measures under Section 706 (such as the substantial LATA boundary modification Bell Atlantic proposes), the Commission should at a minimum determine that more conventional statutory remedies have been pursued in good faith by the petitioning party, but are for some reason unsuitable to the situation at hand.¹³ Here, Bell Atlantic has been completely free since February 1996 to open up West Virginia local exchange markets to competitors, and, based on those efforts, to obtain in-region interLATA authority in West Virginia under Section 271. As far as Helicon is aware, however, Bell Atlantic has never requested interLATA authority in West Virginia.

Bell Atlantic may claim that no one has actively sought to enter the West Virginia local exchange market. To the extent that this is the case, however, Section 271's "Track B" provides a remedy.¹⁴ Bell Atlantic may then claim that while it has entered into interconnection agreements with *potential* competitors (thereby disabling Track B), none of them has actually started providing service. Congress provided a remedy for that potential problem as well, however: Bell Atlantic is entitled to require interconnectors to commit to an implementation schedule, and if they will not do so, Bell Atlantic is entitled to have the West Virginia Public Service Commission impose one in arbitration.¹⁵ If the interconnectors thereafter fail to comply with the schedule, Track B again becomes available to Bell Atlantic.¹⁶

¹³ As noted above, the Commission has recently ruled that Section 706 does *not* empower the Commission to waive or ignore the requirements of Section 271. All that remains of Bell Atlantic's request for relief, therefore, is its proposal for a LATA boundary modification.

¹⁴ See 47 U.S.C. § 271(c)(1)(B).

¹⁵ See 47 U.S.C. § 252(c)(3).

¹⁶ See 47 U.S.C. § 271(c)(1)(B)(ii).

With these statutory mechanisms in place, if Bell Atlantic lacks Section 271 authority in West Virginia two and one-half years following passage of the 1996 Act, it has no one to blame but itself. The total absence of *any* discussion of Section 271 in the Bell Atlantic Petition suggests that this most recent aspect of Bell Atlantic's foray into Section 706 — if not, indeed, the regional Bell's entire Section 706 enterprise — is really nothing more than an effort to undercut the pro-competitive provisions of Sections 251 and 271 of the Act, and to distract the Commission and other policymakers from the Bells' failure to comply with those statutory provisions. It would ill-serve the public interest for the Commission to grant Bell Atlantic's Petition in these circumstances.

5. Conclusion.

Bell Atlantic claims that market forces have failed to deliver needed Internet bandwidth to the state of West Virginia, and that this market failure warrants the extraordinary remedy of emergency abrogation of the key pro-competitive requirements of Section 271 (whether in the form of a grant of interLATA authority or a modification of the relevant LATA boundaries). In fact, the market has responded splendidly to West Virginia's bandwidth needs, with an OC-12 in place, upgradable to an OC-48 as actual demand warrants. This is not a story of market failure. It is a story of market success.

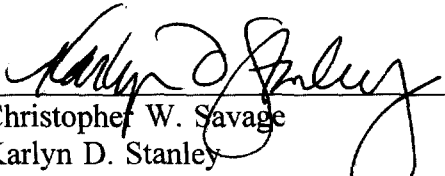
Perhaps more important from a regulatory perspective, however, is not that market forces work in West Virginia (in Helicon's experience, they work essentially everywhere), but that Bell Atlantic is clearly trying to hold the bandwidth needs of West Virginia, including West Virginia schoolchildren, hostage to its anticompetitive regulatory agenda. Bell Atlantic could have begun construction of an interLATA Internet access network for West Virginia's K-12 schools in February 1996. And had it simply fulfilled its duties to competitors and the public under Section 251 of the Act, it could long since have obtained full interLATA authority in West Virginia. Pursuit of either of these courses would have obviated any "emergency" that might have existed in West Virginia prior to the turn-up of the OC-12 facility that Helicon and others have established.

In these circumstances, the Commission clearly has no basis to grant Bell Atlantic's Petition. To the contrary, given the facts, the Commission should flatly deny it.

Respectfully submitted,

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Dated: August 10, 1998

CERTIFICATE OF SERVICE

I, Debra Sloan, do hereby certify that a copy of the foregoing document was mailed first class mail, postage prepaid, this 10th day of August, 1998, to the following:

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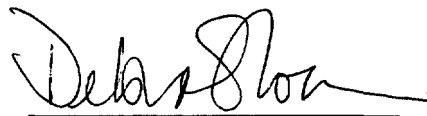
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